United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-6190, 6195

To be argued by
JANIS G. SCHULMEISTERS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 77-6190, 77-6195

In The Matter
of
The Complaint of TUG OCEAN PRINCE, INC., and RED STAR TOWING & TRANSPORTATION CO., as Owner and Charterer of the Tug "Ocean Prince" for Exoneration from or Limitation of Liability,

Plaintiffs and Third-Party Plaintiffs, Appellees-Cross-Appellants,

—v.—

UNITED STATES OF AMERICA,
Third-Party Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

—against—

PITTSTON MARINE TRANSPORT CORP.,
Defendant-Appellee,

TUG OCEAN PRINCE, INC., and RED STAR TOWING & TRANSPORTATION CO.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THIRD-PARTY DEFENDANT/APPELLEE; PLAINTIFF/APPELLANT, UNITED STATES OF AMERICA

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BRIEF FOR THIRD-PARTY DEFENDANT/APPELLEE; PLAINTIFF/APPELLANT, UNITED STATES OF AMERICA

Statement of the Case

This litigation arises from the striking of a well charted rock, outside of the navigable channel on the left or westerly side of the Hudson River north of the Bear Mountain Bridge, by the 295 foot oil carrying tank barge NEW LONDON pushed by the 94.7 foot tug OCEAN

PRINCE on February 2, 1974. Serious pollution of the waters of the Hudson resulted (F 2; F 13; F 25).*

On August 2, 1974, the tug interests petitioned for exoneration from or limitation of liability under 46 U.S.C. § 183, et. seq. in 74 Civ. 3358, in which proceeding the barge interests filed claims for damage to the barge and loss of cargo. Over a year later, on September 5, 1975, the tug interests filed a third-party complaint against the government alleging that its fault caused the casualty. The government answered and counterclaimed against the tug and cross-claimed against the barge for the pollution clean-up expenses, and also filed a separate complaint against them for the clean-up costs and the civil pollution penalty under 33 U.S.C. § 1321 in 75 Civ. 5801. The actions were consolidated for trial and in May 1977 tried before the Honorable Gerald L. Goettel, U.S.D.J., who rendered an opinion on September 6, 1977, which was filed on September 12th. The District Court held the tug's negligent navigation to be the cause of the casualty, denied exoneration to the tug but granted limitation under 46 U.S.C. § 183. It also dismissed the tug's claim against the government and limited the tug's liability for pollution clean-up costs to $100 per gross ton or $19,800.00 under the provisions of 33 U.S.C. § 1321.

On November 9, 1977, Pittston appealed the granting of limitation to the tug, and on November 18, 1977 the government cross appealed the limitation of the tug's liability for clean-up costs, and the tug appealed the dismissal of its claim against the government. The District Court's ruling with respect to the civil penalty is not appealed.

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* References to the District Court's numbered findings will be preceded by letter "F"; to the joint appendix by witness' name followed by page number and letter "a"; to trial transcript by letter "T" and to depositions by "dep."

Statement of Issues

The basic issues, as far as the United States is concerned, are:

1. May a tug boat company limit its liability for pollution clean-up to $100 per gross ton of a 94.7 foot tug (here $19,800) under 33 U.S.C. § 1321(g) when it knowingly places in charge of the navigation of such a tug pushing a 295 foot oil barge at night in wintertime up the Hudson River an individual who never previously navigated on the Hudson; particularly when the make-up of the tug-barge flotilla equals a 1683 ton tanker, when pilotage on the Hudson is compulsory for vessels of 300 gross tons or over, the individual in charge of the navigation had no formal training in navigation, no formal training in the use of radar, the tug had no equipment to take bearings to ascertain its position in the river other than radar, and when in accordance with a practice known to owners the deck hand was sent below to get coffee at the critical time leaving the "navigator" by himself in the wheelhouse, steering, looking at radar, using the searchlight and "navigating"; when such a flotilla strikes a well charted rock outside and to the left of the natural navigational channel of the river and causes serious pollution?*

2. Whether the District Court properly held that the negligent navigation of the 198 ton tug OCEAN PRINCE and the total unfamiliarity with the area by the person navigating the flotilla was the cause of the casualty and that there was no negligence on the part of the Coast Guard in failing to establish additional aids to navigation on shore.

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* The amount of the government's pollution clean-up claim of over $169,000.00 was not determined below as the damages question was deferred.

The same basic facts give rise to both issues. However, as the United States is an appellee with respect to the second issue in 74 Civ. 3358 we shall defer argument on it to the government's answering brief.

Facts

We accept the District Court's numbered Findings of Fact except where they are inconsistent and where the Opinion of the District Court draws conclusions that, we submit, are not appropriate or really are erroneous legal conclusions or both. For the convenience of the Court we summarize the salient points applicable to the Government's cross-appeal.

The parties and the flotilla.

The tug OCEAN PRINCE, owned by Tug Ocean Prince, Inc., was chartered, manned, victualed and supplied by Red Star Towing & Transportation Company, with "management services" provided by Red Star Marine Services, Inc. These are related companies, and for the sake of convenience we shall refer to them collectively as "Red Star" (F 1 through 11). The "management services" included booking of work, scheduling and dispatching of tugs, hiring and firing all tug personnel and overseeing the total operation of the Red Star fleet. The various Red Star Companies were also related to Ira S. Bushey & Sons, Inc., and the various Bushey companies operating in and around the New York area (F 6-9; Kristiansen 280a-282a; See Keenan 712a, 726a). The barge NEW LONDON was owned and operated by Pittston Marine Transportation Corporation (hereinafter "Pittston") (F 1-8, 13).

The tug OCEAN PRINCE of 198 gross tons, built in 1958 had an overall length of 94.7 feet, extreme breadth of 27.1 feet, and her deep draft was about 14 feet. She

was pilothouse controlled and her navigation equipment consisted of a gyro compass, a magnetic compass, a Decca radar and a searchlight (F 2; Reimer 99a-100a; Kiernan 357a). She did not have a pelorus or azimuth circle or any other equipment with which to take visual bearings. The radar had relative graduations. With the cursor or cross hairs relative bearings could be taken (F 2, cf. F 47; Kiernan 411a-412a). Thus, for a radar range or bearing to be taken and plotted on the chart some calculations would be necessary to convert to true bearings and a man steering at the wheel could not do so (Kiernan 424a-425a).

The 295 foot tank barge NEW LONDON of 1,665 gross tons at material times was drawing 12 feet. In her stern was a pushing notch where the bow of the tug fits snuggly. The tug was secured with steel cables and several parts of synthetic line resulting in a flotilla of 385 feet long which operated as one unit (Kiernan 359a, T 262-265). The steering and propulsion for this flotilla were supplied by the tug (F 25).

The Navigating Crews.

The navigating crew of the tug consisted of navigators Walter Reimer and John Kiernan and two deckhands, one assigned to each watch. Each navigator and deckhand stood six hour watches, a total of 12 hours per day (F 15, 18; Kiernan 349a-350a). The fact that deckhands had many other duties and often were sent below for coffee was well known to Red Star's vice-president of operations (Kristiansen 289a-291a; Reimer 194a-195a).

Walter Reimer had been employed by Red Star for about 1½ years while the OCEAN PRINCE operated in southern waters. He had never acted as a navigator on the Hudson River, never attended any formal navigation

school and had never received any formal training in the use of radar (Reimer 154a-157a, Cf. 158a-159a). In southern waters, Reimer had acted as her captain and mate, but when the OCEAN PRINCE came north at the beginning of the year, Reimer left for vacation (Reimer 156a). He rejoined the tug on the afternoon of February 2, 1974.

John Kiernan was not a regular employee of Red Star. He had considerable experience on the Hudson River working for Spantonbush, a related company, but except for the instant voyage never worked for Red Star (F 17; Kiernan 355a).

On February 1, 1974, Kiernan was instructed to join the OCEAN PRINCE and did so as a mate although he then occupied the quarters usually used by the captain of the tug (Kiernan 352a, 795a). He was never told by anyone that he was to act as the captain of the OCEAN PRINCE on this or on any other voyage (Kiernan 355a; See F 21).

On the next day, February 2, the permanent captain of the OCEAN PRINCE left and thereafter Reimer arrived. Kiernan had heard of Reimer being a permanent navigator on the OCEAN PRINCE and, therefore, assumed that he, Kiernan, was to be the mate on this voyage (Kiernan 348a-351a, 355a; F 20). Reimer, returning from vacation and having had no experience in the New York area or on the Hudson as a navigator, without discussing with Kiernan, and without receiving any advices from the company, assumed that Kiernan was to be the captain and he, Reimer, was to be the mate (Kiernan 355a; Reimer 100a; Cf. Keenan T 761-762; F 21).

On Friday, February 1, 1974, Pittston phoned the order to Red Star to tow the NEW LONDON to Kingston. Red Star's dispatcher Keenan decided to assign

the OCEAN PRINCE to the job but did so only at 1800 hours on February 2nd (F 22; Keenan T 748). Told by the day dispatcher, Robert Fitch, that Kiernan was to be the captain and Reimer the mate, Keenan did not communicate this information to the tug and neither had Fitch nor anyone else (F 21, 23; Keenan T 761-762).

Keenan was aware of the make-up of the tug's pilothouse crew, that Reimer had no experience on the Hudson and *assumed* that this lack of experience would be discussed between Reimer and Kiernan (F 20, 23; Keenan T 755, Cf. 767-768; Cf. Kristiansen T 855-871). However, it was not discussed and Kiernan, without any information from the office, erroneously assumed that Reimer had navigated the Hudson before (Kiernan 394a, Cf. 390a-393a). Red Star also *assumed* that Kiernan would help Reimer, if Reimer needed help (F 12, 20, 23, Cf. Opinion 41a). However, Red Star does not have any procedures or instructions of how watches are to be stood; it has no procedures for supplying information or material to tugs (Kristiansen 286a-288a; F 3). And Kiernan did not even check what navigational aids were on the tug when he joined her, or afterwards (Kiernan T 252-254). Thus, the chart on the tug was a 1969 edition and the buoy numbering did not match with the Light List, Ex. 2. On the 1969 chart, Ex. 4, the shoal was marked by buoy 21. In the current Light List on board, Ex. 2, at page 258, Light 21 is a fixed light on Iona Island and buoy 25 is the lighted buoy "Replaced by can from Dec. 1 to Apr. 1" (Cf. Exhs. 2 and 4). Also, the assumption that one navigator would help the other means that the "helper" will stand more than 12 hours of watch per day (see Reimer 106a-107a; F 18, Cf. F 23).

Warnings to navigators.

The Light List, Ex. 2, and the Coast Pilot, Ex. 3, contain various warnings to navigators about ice on the Hudson river, its effect on buoys, etc. The pertinent

quotations are set forth in the District Court's findings 40, 42 and 44 (23a-24a) and we respectfully refer the Court to them. In addition, on page 235 the Coast Pilot states:

> "Pilotage is compulsory on the Hudson River for foreign vessels and U.S. vessels under register. Pilotage north of Yonkers is provided by the Hudson River Pilots Association."

Reimer and Kiernan did not have pilotage endorsements for the Hudson River and technically they were not required to have such a license as they both had the licenses to act as pilots of uninspected towing vessels.

The Navigation and the Casualty.

At about 1800 hours on February 2, 1974, dispatcher Keenan advised the OCEAN PRINCE to proceed to the Exxon Dock at Constable Hook to take the NEW LONDON to Kingston. Nothing was said about who would be the captain, or about Reimer's lack of experience on the Hudson (Kiernan 390a-394a; Keenan T 761-762). The OCEAN PRINCE proceeded there and between 1845 and 1915 hours the tug was secured to the barge after which Reimer went below and Kiernan continued in charge of navigation (F 22; Ex. 6; Reimer 114a-117a). At 11:30 P.M. Reimer came to the pilothouse and relieved Kiernan. The latter remained with Reimer for about 15 minutes during which time navigation was not discussed (F 26; Reimer 117a-118a, 128a-129a, 225a, Cf. 196a; Kiernan 386a, 393a). There was no deckhand in the wheelhouse as they apparently relieved each other below (Kiernan 420a-421a, Cf. 364a-365a; see Reimer 194a). The flotilla was approaching Haverstraw and, after Kiernan went below, continued northbound toward Bear Mountain Bridge. Thereafter, the deckhand had apparently come to the wheelhouse, as

when the flotilla passed under the bridge, Reimer sent him down to the galley to get coffee, again remaining by himself in the wheelhouse steering the vessel, using the searchlight, checking the chart of a strange area and checking the radar, as if he could actually do all of those things by himself (see Reimer 193a-194a). Although Reimer was able to see both shorelines of the river, he mainly used his searchlight to look for buoy 25 (believing it to be buoy 21) on the left hand side of the channel and when he did not see it, he slowed the flotilla to half speed (Reimer 132a; see Kiernan 417a). He, never observed the light on Con Hook Island ahead, although it should have been seen from a position in the river off Fort Montgomery or town of Manitou, about 1.5 miles south of the light and one mile south of the point of striking (Reimer 196a-197a; Kerns 666a). The deckhand returned to the wheelhouse just about the time that the barge struck the rock outside and to the left of the navigational channel or possibly a very brief interval before (Reimer 194a). Reimer never saw the can buoy while Kiernan, summoned to the wheelhouse shortly after the striking, observed the can buoy on the starboard beam of the tug 50 to 75 feet away and also observed the Con Hook Island light ahead (Kiernan 372a-374a; F 35). As Reimer was very upset, Kiernan took over the navigation, turned the flotilla around and headed south for the Dayline Pier (F 35). After turning around Kiernan observed the lights on the Bear Mountain Bridge about two miles away confirming that the visibility then was at least two miles (Kiernan T 264-265; F 35).

As a result of that striking, oil leaked into the waters of the Hudson River, sometimes estimated to be as much as over 80,000 gallons creating a serious pollution problem (Reimer 181a; Boge T 600; Warman T 692-693).

Following the casualty Kiernan, for the first time, started to fill out various reports that the captain of the

tug usually completes, giving the reason that Reimer was too upset to do so (Kiernan 430a).

Contentions

A. We contend that the casualty resulted from the negligence and negligent procedures of Red Star's management of such flagrant nature that it amounts to "willful negligence" within the privity and knowledge of Red Star within the meaning of 33 U.S.C. § 1321(g).

B. We further contend that if Red Star is permitted to limit liability pursuant to subsection (g), that the limitation fund should be that of the entire flotilla, i.e. the combined tonnages of the tug and barge, or $186,300.00.

Summary of Argument

1. Without the tug a barge like the NEW LONDON cannot move. The dominant mind of the flotilla is the tug. Once lashed together they operate and move as a unit, all within the responsibility and under the care and custody of the tug,—practically they act and operate as an equivalent 385 foot 1863 gross ton tanker.

2. The tug owner and operator knows that its mates and captains will be in charge of and navigate such flotillas, and, therefore, the owner's and operator's duty to the public, the environment and other vessels is to employ individuals with commensurate training and experience. Anything less is a willful violation of its duty toward the public and our environment.

3. Red Star abrogated its managerial responsibility and duty in knowingly permitting Reimer, a navigator totally inexperienced on the Hudson to be in charge of

the navigation of such a flotilla up the Hudson in wintertime in ice. They had to know that the inexperienced Reimer would be on watch by himself during some part of the voyage.

4. Technically, a 198 gross ton uninspected towing vessel is not required to have a Hudson River pilot. However, vessels over 300 gross tons do require pilots, McKinney's N. Y. Navigation Laws, § 89-a. Thus, any man in charge of an 1863 ton oil carrying flotilla should have knowledge equal to that of a Hudson River pilot, and the assignment of the job to a man going up the river for the first time with only a few hours notice is willful negligence.

5. Similarly, using a vessel that has virtually no navigational equipment or manpower to ascertain the flotilla's position in the river, amounts to willful negligence when the owner or operator knows that the navigator does not have local knowledge.

6. Moreover, the knowledge and acceptance by Red Star's management (here the vice-president of operations) that as a common practice their tugs and flotillas fail to keep proper lookouts, in violation of 33 U.S.C. § 221 (Article 29 of the Inland Rules of the Road), amounts to willful negligence.

7. Red Star should not be permitted to escape full responsibility by arguing on one hand that tugging is so different from large vessel operation that safe navigation practices do not apply, and at the same time argue that having one man with local knowledge (even if asleep off duty) is sufficient to make such a flotilla seaworthy.

8. All of the above are illustrative of the criticism the related company, Ira S. Bushey & Sons, Inc., received from the District Court in Vermont, affirmed by this

Court in *United States* v. *Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110 (D.C. Vt. 1973), *aff'd*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974). The instant case illustrates that the companies have not learned the lesson and continue to ignore the dangers of pollution and damage to the environment.

I. The OCEAN PRINCE and, therefore, the flotilla, was unseaworthy within Red Star's privity and knowledge.

The flotilla was unseaworthy because:

1. The person in charge of navigation at the material time was not familiar with the area.

2. The tug OCEAN PRINCE had no equipment with which to take bearings to ascertain her position.

3. The navigating crew of the tug was in the dark as to who was the master or person in charge of the voyage.

4. Proper lookout was not maintained, a situation that was a regular practice.

5. All of the above were known to Red Star's managerial office personnel.

Seaworthiness is a relative term depending upon its application to the type of vessel and the nature of the voyage. The general rule is that the vessel must be staunch, strong, well equipped for the intended voyage and manned by a competent and skillful master of sound judgment and discretion. *The Niagara* v. *Cordes*, 16 U.S. (21 How.) 7 (1859); *Northern Com. Co.* v. *Lindblom*, 162 F. 250 (9th Cir. 1908); *Adams* v. *Bortz*, 279 F. 521 (2d Cir. 1922); *The Framlington Court*, 69 F.2d 300, 304 (5th Cir. 1934), *cert. denied*, 292 U.S. 651

(1934). The burden to prove seaworthiness and the exercise of due diligence to make the ship seaworthy is upon the vessel owner or operator, *Terracciano* v. *McAlinden Construction Co.*, 485 F.2d 304, 307-308 (2d Cir. 1973).

We respectfully refer the Court to *Waterman Steamship Corporation* v. *Gay Cottons*, 414 F.2d 724 (9th Cir. 1969) for a discussion, analysis and collection of cases dealing with unseaworthiness, limitation of liability and owner's privity and knowledge. Particularly to the limitation of liability cases collected in footnote 14 on page 730, and the tug barge cases identified in footnote 20 on page 733. We shall discuss some of them, as applicable to the situation at bar.

We submit that a major factor is the degree of control that Red Star could have exercised over the voyage but negligently failed to do, and refer to the following quotation on page 734:

> "[T]he more restricted the operation in which a vessel is engaged, the greater will be the degree of control which the corporate owner will be required to exercise over master, crew and subordinate shoreside employees. * * *
>
> [T]he duty to control increases along with the possibility of control * * *." Gilmore & Black, Admiralty (2d ed. 1957) 704, quoted in Avera v. Florida Towing Co. (THE EILEEN ROSS), 5 Cir., 1963, 322 F.2d 155, 165."

In the *Avera* Case, *supra*, the owner failed to check, and a totally inexperienced 17 year old youth lost a leg because he had been hired and assigned a dangerous job for which he was not qualified. Limitation was denied because the owner had abrogated his management responsibility.

Admiral Towing Company v. *Woolen*, 290 F.2d 641, 642 (9th Cir. 1961) is more akin to the situation at bar. There the owner failed to inquire as to who had been hired as the second man on the tug for a 50 hour voyage. Again it was a totally inexperienced 17 year old student and limitation was denied, as the owner was charged with "privity and knowledge". In our case, Red Star was even more reckless. The dispatcher knew that Reimer was not experienced on the Hudson and therefore unqualified (see Keenan 713a; Reimer 157a). Moreover, Red Star compounded this situation by failing to clarify to Reimer and Kiernan as to who was the master.

Incompetence of the navigator makes the flotilla unseaworthy. See *The Ruth Conway*, 75 F. Supp. 514 (D.C. Md. 1947), aff'd. *sub nom Harbor Towing Corporation* v. *Parker*, 171 F.2d 416 (4th Cir. 1948), *cert. denied*, 337 U.S. 907 (1949). Limitation was denied there on two grounds, insufficient power of tug and incompetence of her master. With respect to the latter the District Court at pages 519-520 said:

> "* * * (I)t was lawful for a Diesel tug of this type to be navigated by persons not holding any license. However, the fact that the master of the tug Hustler did not have a license explains in part, at least, why he did not have, ready at hand, the knowledge which having such a licence presupposes, knowledge which the law with respect to safe navigation requires that a tug boat master shall always possess and use. Therefore, this serious lack on the part of the master must be imputed to the tug's owner, because the weight of the credible evidence shows that the respondent should have known that (1) the tug's master was not fully competent for the work in hand; * * *"

In the case at bar, Reimer's incompetence on the Hudson was known to Red Star (Keenan 713a; see Kristian-

sen 295a-298a). Yet, it did not even tell the other navigator Kiernan. We submit that Red Star's *assumption* that Reimer and Kiernan would discuss the voyage, and Red Star's assumption that Reimer would ask for help and Kiernan would then stand the watch with Reimer is no excuse.

Over 100 years ago, the Supreme Court laid down the standard for a river pilot in *Atlee* v. *N.Y. Union Packet Company*, 88 U.S. (21 Wall.) 389 (1875):

> "* * * (T)he pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. * * * He must know where the navigable channel is, in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently located in the course of the river, as . . . sunken rocks. . . All this he must know and remember and avoid . . ." (p. 396).

Local knowledge is necessary on a river like the Hudson and assigning Reimer as navigator on this voyage was such negligence that it amounts to willful misconduct, because there was no way that Reimer could meet the standards of a pilot on the Hudson on this voyage, see *Essex County Electric Company* v. *M/S GODAFOSS*, 129 F. Supp 657 (D.C. Mass. 1955).

We submit that it is unreasonable to assume and argue that Kiernan would help Reimer to stand his watch (F 23 Cf. F 20). Kiernan had already stood 12 hours of watch on that day (Kiernan 349a-350a). If that argument is to hold water, then the logical conclusion is that Reimer was to be on board as a trainee and Kiernan was to navigate all the way from Bayonne, New Jersey to Kingston, and probably back to New York Harbor. Or does Red Star suggest that one trip will make Reimer

a competent pilot on the Hudson? On what part of the voyage was Kiernan to get some sleep?

We respectfully submit that the District Court erred in accepting as a proper standard that it was

> "* * * in accordance with accepted practice in the tugboat industry of dispatching a tug to an area one of the navigators had not navigated before so long as the other navigator on board has experience in the area." (F 23);

and that it was "customary practice" for Kiernan to stand watch with Reimer (see F 26).

In the *T. J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) Judge Learned Hand said:

> "Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." (Citations omitted)

Particularly, when the Coast Pilot, Ex. 3, at page 235 states that pilotage is compulsory for foreign vessels and vessels under register and McKinney's N.Y. Navigation Laws, § 89-a provides in part:

> "Every foreign vessel and every American vessel—under register, except vessels proceeding otherwise than by sea and of less than three hundred gross registered tons * * * shall take a Hudson river pilot licensed under the authority of this article * * *"

As it was in the case of *The Ruth Conway*, *supra*, a diesel tug of 198 gross tons, such as the OCEAN PRINCE, did not require a Hudson River pilot. We submit, however, that using this tug to push a loaded oil barge up the Hudson River changes the situation and a competent man *on the Hudson* should have been at the wheel at all times. Red Star's *modus operandi* did not provide for it. This, we submit, amounts to unseaworthiness within the owner's privity, as there was actual knowledge.

The practice of improper lookout

The flotilla was also unseaworthy by reason of the practice on Red Star tugs whereby a proper lookout was not maintained, and Reimer, really a stranger to the Hudson, remained alone in the pilothouse. We submit that the District Court erred in concluding that "* * * (t)he failure to post a lookout cannot be said to have contributed to the collison" (Opinion 40a). 33 U.S.C. § 221 (Article 29 of the Inland Rules of the Road) provides:

> "Nothing in these rules shall exonerate any vessel, or the *owner* or the master or crew thereof, from the consequences of any neglect * * * to keep a proper lookout, * * *" [Emphasis supplied.]

The importance of a lookout was stated by the Supreme Court in *The Ariadne*, 80 U.S. 475, 478-479 (1871) thus:

> "The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. * * * It is the duty of all courts, charged with the administration of this branch of our jurisprudence, to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty, and the effect of non-per-

formance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."

Any argument that the lookout rule does not apply to tugboats was dispelled by this Court in *The Supply No. 4*, 109 F.2d 101, 103 (2d Cir. 1940). There:

> "The district judge made no finding with respect to the tug's lookout except to remark that the lookout, 'however efficient, could not have seen any vessel coming toward the entrance of the slip until the bow of the Dalzellea had passed the pier shed at the extreme end of the pier.' This fact, however, does not absolve the lookout from the duty to listen, nor justify the diverting of his attention to the performance of other duties, such as gathering up fenders. We are disposed to think that the tug did not have a sufficiently attentive lookout. See *Edward J. Barton Lighterage Co.* v. *Davis*, 2 Cir., 4 F.2d 999, 1000; *The William A. Jamison*, 2 Cir., 241 F. 950, 952."

In the case at bar the District Court held that "there was no proof whatever that a lookout forward could have observed the ice stranded buoy" (Opinion 40a). This, we submit, misses the mark. The lookout could have seen the Con Hook Light, which Reimer never saw, but Kiernan observed as soon as he came to the pilothouse (Reimer 196a-197a; Kiernan 374a, 400a). This could have shown Reimer that he was too far to the left.*

Also, the District Court's conclusion is contrary to the Court's own comment and finding that

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* We also point out that there was no evidence by Red Star of what the deckhand did see when he returned to the wheelhouse as he was not called at trial.

a) "Had the deckhand been available he could have taken the wheel while a radar range was taken, or been sent forward as a lookout, or as the best course, been sent to get Kiernan out of his bunk." (Opinion 34a)

b) "With proper use of radar, Reimer could have gotten a radar range from The Bear Mountain Bridge with reasonable accuracy. With a radar range off Bear Mountain Bridge and a visual bearing on Con Hook Light it would have been possible to construct a danger bearing to keep the Vessel off the rock * * *" (F 47).

Of course, one would first have to see Con Hook Light. Reimer did not see it, and there was no lookout to report it, as the lookout was getting coffee (Reimer 194a). And this was the usual practice condoned by Red Star's vice-president of operations, Kristiansen (Kristiansen 289a-291a).

We submit that the rule of *The Pennsylvania*, 86 U.S.C. 125, 136 (1874) applies and Red Star had the burden to show not merely that the statutory violation "might not have been one of the causes, or that it probably was not, but that it could not have been a cause of the casualty." We submit that Red Star did not sustain this burden, *Dwyer Oil Transport Co.* v. *The Edna M. Matton*, 255 F.2d 380 (2d Cir. 1958).

Closely analogous is the situation of the tug having no equipment with which to take bearings other than radar, which needs some time and work (see Reimer 169a; Kiernan 424a-425a). We submit that the last sentence of the District Court's finding 47 that

> "* * * since the Tug, as most tugs was not equipped with a gyro repeater or a palorus it was difficult to take accurate visual bearings."

runs contra to *The T. J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932). Even if most tugs do not have such equipment, it should be on board,—particularly when a stranger to the river, as Reimer, is navigating. We again refer by analogy to *Waterman Steamship Corporation* v. *Gay Cottons*, 414 F.2d 724 (9th Cir. 1969) at pages 736-737 and the cases cited at footnote 28 and 29 with respect to the owner's failure to provide proper equipment.

II. The District Court's authorities distinguished.

We respectfully submit that the authorities by the District Court are not applicable.

With respect to the cases dealing with the master's competence we point out that *The Lady Pike*, 88 U.S. 1 (1874) really was not a limitation of liability case but a case dealing with negligence of the person in charge of the tug boat. *The Temple Bar*, 137 F.2d 293 (4th Cir. 1943) deals with an ocean-going vessel on a foreign voyage. There, we agree that it is sufficient in most situations to supply the vessel with proper charts and publications and a fully licensed master and officers. Obviously, no master can be found who has travelled to every port in the world. That is why there are sailing directions for international voyages. In our situation, the standards are different because we are dealing with circumstances where local knowledge is of importance and where the operation in which the vessel is engaged is more restricted and within greater control of the corporate owner, see *Waterman Steamship Corporation* v. *Gay Cottons*, discussed *supra* in Point I, page 13. We submit that the instant case is more analogous to *Spencer Kellogg & Sons, Inc.* v. *Hicks*, 285 U.S. 502 (1932), where the Supreme Court denied limitation because the owner failed to exercise the necessary control over the ferry captain running through ice in the New York area. We

submit this is very analogous to the situation at bar, as the dispatchers here are located in the New York area and the tugs have voice radios with which they communicate with the office daily.

Similarly, we submit that the District Court's reliance on *Farrell Lines, Inc.* v. *Jones*, 530 F.2d 7 (5th Cir. 1976) is also misplaced. There, there were two pilots, the master and a deck officer on the bridge of an ocean-going vessel and the casualty occurred because the helmsman turned the wheel the wrong way. When the error was caught, the narrowness of the channel did not permit correction. It was an error of a few moments duration. On the OCEAN PRINCE, the management's errors existed at the beginning of the voyage: confusion as to who was master; owner's knowledge that one of the navigators was totally incompetent for the Hudson; a practice whereby the statutory requirements of a good lookout were ignored; and no equipment with which to take bearings, other than radar, which would require more time and some manipulation. Moreover, the practice of the deckhand leaving the pilothouse at night even precluded the proper use of radar, not to mention the fact that Reimer did not really have any training in the use of radar, and, that may be the reason why he thought he was getting a false image on the radar (see Reimer 155a, Cf. 163a-166a; and Cf. Kiernan 411a, 420a and Kerns 665a-666a).

Also, we submit that the District Court may have been influenced by the reversal in *American Smelting & Refining Corp.* v. *SS IRISH SPRUCE*, 548 F.2d 56 (2d Cir. 1977). While the District Court did not cite that case in connection with limitation of liability questions, the effect of that case, we submit, cannot be overlooked.

While any one of the deficiencies of the OCEAN PRINCE and the Red Star operation by itself may not amount to willful negligence, we submit that all taken

together, amount to such gross negligence that it is equivalent to willful negligence or willful misconduct within the owner's privity as meant in 33 U.S.C. § 1321 (g). Accordingly, the United States should be entitled to recover all of its pollution clean-up expenses.

III. Red Star should not be allowed to limit its liability with respect to the government's pollution claim, and, if allowed to limit, the fund should be $186,300.00, measured by the combined tonnages of the tug and the barge.

The Water Pollution Prevention and Control Act of 1972, 33 U.S.C. 1251-1376 resulted from the public outcry caused by frequent oil spills from vessels and on-and-off-shore facilities that ruined the beaches and lowered the quality of our rivers, shore waters and have jeopardized animal and vegetable life. See report of Committee on Public Works, U. S. Senate, 91st Congress, Report No. 91-351, p. 3. Particularly, the damage was brought to public attention as a result of the strandings of the TORREY CANYON, the OCEAN EAGLE and the Santa Barbara spills. Therefore, in Section 1251, Congress declared:

> "The objective of this chapter is to restore and maintain the chemical, physical and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter that
>
> (i) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985 * * *."

33 U.S.C. § 1321 with its various subdivisions is applicable here. It sets up a scheme for dealing with pollution instances. Briefly summarized it is as follows:

Subsection (b) (1) provides that:

> "The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil * * * upon the navigable waters of the United States. . . ."

Subsection (b) (3) provides that:

* * * * *

> "The discharge of oil into or upon the navigable waters of the United States * * * *is prohibited*, except [in the situations not applicable here and that] * * * Any regulations issued under this subsection *shall be consistent with maritime safety and with marine and navigation laws and regulations* and applicable water quality standards." [Emphasis supplied.]

Subsection (c) provides for clean-up by the United States if the spiller does not or is not capable of cleaning the spill; subsections (f) and (g) deal with the defenses of spillers when the government cleans the spilled oil; subsection (h) reserves the right to any party to proceed against the guilty party who may have cast him (the spiller) into liability; and subsection (i) gives an innocent spiller the right to recover from a fund his clean-up costs.

Even before the Act came into existence this Court affirmed specific remedial measures against the companies related to Red Star because of their notorious disregard for the environment, see *United States* v. *Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110 (D.C. Vt. 1973), *aff'd*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974).

The evidence in this case shows Spentonbush (Kiernan's regular employer) and Ira S. Bushey & Sons, Inc. are companies related to the Red Star companies (F 6, 7,

8, 9, 10; Kiernan 389a-390a; Kristiansen 280a-282a; dep. 63).

We submit that the lackadaisical approach to manning of the tug shown by Red Star in this case, discussed *supra*, is just a carryover of the Bushey operation (albeit by separately incorporated companies) all operating from 500 Fifth Avenue, New York City (Cf. Kristiansen 282a and Findings 2 and 4 of *United States* v. *Ira S. Bushey & Sons, Inc., supra,* at pp. 111-112).

The District Court limited Red Star's liability for pollution clean up costs to $100 per gross ton of the tug OCEAN PRINCE, or $19,800 because of the provisions of subsection (g) because of the following wording:

> "* * * (The third-party causing the spill) shall notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred * * * for the removal of such oil * * * by the United States Government in an amount not to exceed $100 per gross ton of such vessel or $14,000,000.00, whichever is lesser, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs."

The identical wording appears in subsection (f) which deals with the actual spiller or discharger.

We submit that the limitation of the tug's liability to the tug's tonnage results in a anomaly. The barge does not go anywhere without a tug pushing it. When they operate, they do so as a unit (Kiernan 415a-417a). Thus, we submit that for the purposes of this act the tug and barge are one unit, one vessel, one navigational mind and

one liability,—that of the entire flotilla of 1863 gross tons with a minimum liability of $186,300.00 which would cover the government's outlay of about $169,000.00. Any other result does violence to the intent of the statute. They operate together, they cause pollution together, but when payment time comes for clean-up costs, only the tonnage of the power plant is put forth. We respectfully submit that such a result is wrong.

The same result has been attained in similar situations in what sometimes has been called the flotilla doctrine. See *Sacramento Navigatino Company* v. *Salz*, 273 U.S. 326 (1927), where the tug and tow both constituted the "vessel transporting merchandise."

Also see *Standard Dredging Co.* v. *Kristiansen*, 67 F.2d 548 (2d Cir. 1933), *cert. denied*, 290 U.S. 704 (1934); the *Columbia*, 73 Fed. 226 (9th Cir. 1896) where the Court said that

> "* * * the tug and barge are, in law considered one vessel, for the purpose of the voyage in question, * * *" (p. 238).

Although there are authorities to the contrary, such as *Liverpool, Brazil & River Plate S.N. Co.* v. *Brooklyn Eastern District Terminal*, 251 U.S. 48 (1919) and *The Transfer No. 21*, 248 Fed. 459 (2d Cir. 1917) where this Court said that

> "A tow without motive power, alongside a tug and moved by it, cannot be at fault,"

We submit that they can be distinguished. There, the tug and the tow were not really operating as a unit. In the case at bar the barge has a specially constructed pushing notch where the bow of the tug fits and is secured for a voyage of some duration.

The argument that the diverse ownership of the tug and the barge create a situation of divisible liability (or different limitation funds) really creates an anomaly. If the tug and barge were owned or controlled by the same operator it seems there should be no question that the tonnage of the whole flotilla would be the limitation fund. The result should be the same here.

Other cases that have considered the flotilla doctrine are *Deep Sea Tankers* v. *The Long Branch*, 258 F.2d 757 (2d Cir. 1958) and *In Re U.S. Dredging Corp.*, 264 F.2d 339 (2d Cir. 1959) against, and *Brown & Root Marine Operators, Inc.* v. *Zapata Off Shore Co.*, 377 F.2d 724 (5th Cir. 1967) and *In Re Drill Barge No. 2*, 454 F.2d 408 (5th Cir. 1972), *cert. denied*, 405 U.S. 1065 (1972) for its application.

We request this Court to hold that the limitation fund for pollution clean-up should be at least $183,600.00.

In any event, we submit that the gross inattention to the potential harm to the environment by Red Star amounts to wilful negligence or wilful misconduct within the meaning of the statute and there really should be no limitation in this case against the government's claim for pollution clean-up expenses. "Willful misconduct" does not require an intent to do harm. It is the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, or it may be the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences, *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532, 536-537 (2d Cir. 1965) and cases cited therein.

All the actions and faults of Red Star taken together, we submit, amount to such "willful misconduct."

CONCLUSION

This Court should hold that Red Star may not limit its liability with respect to the government's claim for pollution clean-up expenses, or, in the alternative, that the limitation fund be no less than $186,300.00, and to that extent reverse the District Court.

Respectfully submitted,

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